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Employment Law Letter

Summer 2016

Labor & Employment Practice Group

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New Connecticut Pay Equity Law Gets First Test

Last year the General Assembly enacted legislation prohibiting all public and private sector employers from disciplining an employee for "discussing the amount of his or her wages [or] inquiring about the wages of another employee." Legislators were apparently persuaded that wage confidentiality rules, which were common in Connecticut workplaces until the new law was passed, facilitated pay discrimination based on age or gender.

Now a 62-year-old woman has sued her employer, Gerard Metals, alleging that she was threatened with discharge after complaining about her rate of pay as compared to that of other employees. She states she did not receive a raise for two years and her bonus was cut in half, and she told the human resources department that "she felt she had been underpaid for years." Shortly thereafter, she received a written warning that "future outbursts and/or accusations will not be tolerated."

According to press reports, the woman has previous complaints still pending against her employer, so her new claim may get consolidated with others. However, this case is a reminder that Connecticut employers can no longer prevent employees from sharing information about their pay. Also, the penalties under the new law are severe. They include compensatory and punitive damages, attorney's fees and costs.

Although the pay equity law applies to all employers and employees in the state, as a practical matter its biggest impact will likely be in the private sector, since the pay of governmental employees is public information, and in many cases controlled by union contracts.

Our advice is to assume that individual employee pay information may be generally known in the workplace, even though the law does not require employers or employees to share it, at least in the private sector. In any event, wage transparency probably encourages employers to avoid or correct pay inequities, whether inadvertant or otherwise.

Emotional Distress Awards Becoming More Common

It's bad enough when an employer gets tagged with an award of lost wages after a terminated employee successfully claims discrimination, wrongful discharge or the like. But to add insult to injury, more employees are seeking -- and winning -- damages for emotional distress as a result of their firing, sometimes in amounts that dwarf their lost wages. Two recent cases illustrate the point.

One involved an African-American cook at a café in Waterbury who gave a two-week notice that he planned to quit and take a higher-paying job. The next day, a purse was stolen at the café, and despite the fact that the cook was not scheduled to work that day, a supervisor gave his name to police as a possible suspect. Another employee was found to have committed the theft, but the café fired both employees.

The CHRO found there was race discrimination, since the café had two white employees who, like the cook, had prior criminal convictions, but whose names were not given to police. The cook's lost wages were less than $1000, since he started another job within two weeks. However, the CHRO awarded $8,000 in damages for emotional distress, because the cook established that he was embarrassed and humiliated when questioned by police in front of co-workers, and sought psychiatric counseling as a result.

This amount pales in comparison to a $100,000 jury verdict for emotional distress awarded to an occupational therapist terminated by a southeastern Connecticut health care facility. She had been responsible for developing an important program, and had a contract that made her the highest paid employee in the facility. However, after she complained about improper billing practices by co-workers, she herself was fired, allegedly because she filled out paperwork showing 15 minutes of work with a dementia patient, which the patient claimed never happened.

The employer challenged the emotional distress award, which was almost seven times the therapist's lost wages, and argued that any termination was stressful. However, the judge upheld the award, saying the jury could have reasonably concluded that the therapist was hired in order to gain her expertise in developing a valued program, then fired on dubious grounds so the employer could rid itself of an expensive employee. The plaintiff testified that as a result of her discharge she was devastated, in shock, numb and confused, and her husband testified that her personality changed permanently.

Our advice to employers is to consider how a discharge would look to a third party before firing any employee. Despite appearances, it may be that the employers in the above cases honestly felt they had good reasons for their actions, but they failed to consider how those actions might be perceived if viewed from a different perspective.

Aggregate Teacher Ratings Found To Be Public Records

By law, individual teacher evaluations and performance ratings are not available to the public. Presumably this protects privacy and reduces the risk of "teacher shopping" by parents looking for the best education for their kids. But what about district-wide results, such as how many teachers are rated as exemplary, proficient, developing or below standard?

The New Milford Board of Education refused to comply with a request for such data by a former school board member, who complained to the Freedom of Information Commission. He argued that such statistics did not identify individual teachers or schools, and therefore his request did not violate the letter or the spirit of the law protecting individual teacher evaluations.

The Connecticut Education Association, the state's largest teacher union, joined the school board in defending its refusal to release the requested information, claiming that disclosure would be manifestly unfair and discriminatory. The FOIC didn't buy their arguments, and ruled that aggregate, district-wide statistics on teacher evaluation and performance are public records. The Commission ordered them to be disclosed to the complainant without charge.

Our opinion is that such disclosure could serve useful

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purposes. It might help identify situations where evaluators in particular school districts are "A graders" or "C graders," or where lackluster teacher performance is a widespread problem. In any event, it is difficult to see how disclosure of district-wide statistics could invade the privacy of individual professionals or facilitate teacher-shopping. Of course, aggregate teacher ratings might encourage parents to move into or out of particular school districts, but perceptions of school district quality have long been a factor in such decisions.

ABC Test Clarified By CT Supreme Court

Most HR professionals are familiar with the so-called ABC test, which the Connecticut Department of Labor uses to determine whether a particular worker can legitimately be treated as an independent contractor, or whether he or she is properly classified as an employee. The answer to that question has financial consequences to the employer in terms of payroll taxes and other costs. The test considers (A) the degree of the employer's direction and control of the worker, (B) whether the work is performed at the employer's place of business or is integral to that business, and (C) whether the worker performs the same services for other employers.

Our Supreme Court recently considered the second part of the test in the context of technicians who perform installation and repair work on furnaces and security systems sold by Standard Oil. The technicians work largely independently, and perform the same type of work as part of their own business, but DOL argued they were employees of Standard Oil because the customer homes where they worked were in effect the company's place of business.

In a sharply divided opinion, a majority of the justices decided that customer homes were not the company's place of business, so independent contractor status was justified. They thought it was particularly significant that there were no supervisors or other company employees present when the technicians performed their work.

Our opinion is that CT DOL may seek legislation to change this result. Also, the decision in this case is only helpful to an employer if it can satisfy the other elements of the ABC test. In particular, treating a worker as an independent contractor if he or she does not do the same type of work for any other employer is generally risky business.

Legal Briefs *and Footnotes*

Save a Life, Get Fired: St. Francis Hospital probably isn't happy about the publicity it got when it successfully argued for the dismissal of a wrongful discharge case filed by a nurse terminated after 32 years of discipline-free service. It seems that, when a patient who arrived by ambulance was separated from his temporary pacemaker, he suffered a heart attack. Because the hospital didn't have the proper adapter to reconnect him, the nurse stripped the end of the pacemaker wire so it fit the hospital's equipment, and the patient survived. However, the nurse was fired for "tampering" with the device in violation of hospital policy. She sued, but the court said there was no public policy against firing someone for a rule violation, even if it saved a life.

Jobless Benefits for Quitting: Unemployment compensation is not supposed to be available to an employee who "leaves suitable work voluntarily without

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good cause attributable to the employer." However, a Superior Court judge recently upheld an award of benefits to an employee who quit after being placed on probation due to poor performance. The court said probationary status exposed the employee to reviews every 30 days and mandatory discharge if any such review was unsatisfactory, which constituted a substantial change in working conditions. The decision seems to incent employees in such circumstances to quit, because if they stay but don't improve, they may be denied jobless benefits when they're fired.

Workers' Comp Not an Exclusive Remedy: Most people think that if you're hurt on the job, workers' comp is your only remedy. Two recent court decisions show that's not always the case. In one, an employee was bitten by a dog that the employer allowed a co-worker to bring to work. The employee was awarded workers' comp because the injury occurred in the course of employment, but was not precluded from suing the employer under Connecticut's dog bite statute because the injury did not "arise out of" the employee's job. The other involved a welder who was badly burned while working for a contractor in an energy plant in Sterling. Although he received workers' compensation benefits through his employer, he collected $1,440,000 from the energy plant and its maintenance contractor, because multiple fire extinguishers in the plant failed to work properly.

TAs Require Unanimous Support: A few years ago the Bristol Board of Education's negotiations committee reached a tentative agreement in contract negotiations with the union representing its blue collar workers, but a majority of the full Board voted it down, despite a favorable recommendation by the committee chair and other key members. The parties went to binding arbitration, where the Board scored an unprecedented win by securing the right to contract out its cafeteria operation. However, the State Board of Labor Relations ruled the Board was bound by the tentative agreement, because a negotiations ground rule required each side to recommend ratification, and one of the Board's committee members voted "no." An Appellate Court judge has now upheld that result. One wonders if public officials will want to serve on negotiating committees if by doing so they lose the right to vote their conscience on any tentative agreement reached.

Now We've Seen Everything: Press reports from Detroit describe the following rather remarkable situation: A firefighter was convicted of drunken driving resulting in a crash, and carrying a concealed gun. He was sentenced to jail for three months. Someone in the fire department filed paperwork indicating that the employee had been reassigned to the Hazmat unit, and so his paychecks (including overtime) kept coming while he was serving his time. Fortunately, someone tipped off management, and the department says it is looking into the matter. No wonder Detroit is in dire financial straits.

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